



In The
Supreme Court of the United States
October Term, 1977

No. 77-1101

PAPPAS TELEVISION, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
and
UNITED STATES OF AMERICA,
Respondents.

**JOINT BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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San Joaquin Cable TV and Fresno Cable TV Co., Inc.,
hereby jointly oppose pursuant to Rule 24 of this Court the
Petition for a Writ of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit filed by
Pappas Television, Inc.

COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case is incomplete, inaccurate and misleading. Hence the need for this Counterstatement. The petition filed by Pappas Television, Inc. (Pappas), seeks review of a *per curiam* judgement of the

United States Court of Appeals for the District of Columbia Circuit affirming a series of decisions of the Federal Communications Commission (Commission) rejecting Pappas' requests that carriage of two distant independent stations ordinarily permitted by the Commission's Rules be prohibited on cable television systems in the Fresno, California, area.

San Joaquin Cable TV (San Joaquin) and Fresno Cable TV Co., Inc. (Fresno Cable), were granted pursuant to two of the Commission's orders under review certificates of compliance to operate a cable television system in the City of Fresno. Fresno Cable pursuant to another of the orders under review was granted a certificate of compliance to operate a system in other communities in the Fresno area. (App. 8). They were also parties to the proceeding set forth beginning on App. 70. San Joaquin and Fresno Cable were intervenors in the proceeding before the Court below.

The most critical fact omitted by Pappas is the disastrous effect on cable television in the Fresno area that would result from the grant of the relief sought by Pappas — a prohibition on the carriage of the two distant independent signals permitted by the Rules.¹ The two distant independents are the only English language commercial stations proposed by San Joaquin and Fresno Cable that are not available off-the-air in the Fresno area. (App. 35 and 59-60). The Commission's Rules permitting their carriage are bottomed on the proposition that people will not be willing to pay the extra money to receive cable television service if they receive only the signals already available free off-the-air. There is evidence in the record

¹The term distant signal refers to any television station that cannot assert a mandatory right to cable carriage on a given system under the applicable Rule governing signal carriage. The pertinent Rule governing signal carriage in Fresno is 47 C.F.R. § 76.63 which cross-references to 47 C.F.R. § 76.61.

that without the two distant independent signals, construction of the cable television system in Fresno is not economically viable. Thus, the grant of the drastic relief sought by Pappas would deprive the public in Fresno of the benefits of cable television.

The Commission's Rules permit the carriage of distant educational, foreign language and religious stations as well as programming originated by the cable operator; however, generally these types of programming are of interest only to small segments of the population and would not in and of themselves make cable television feasible. The only non-broadcast service of possible general interest is subscription or pay cable. This is a service whereby subscribers may for an additional charge over and above the fee for basic cable service receive such programming as first-run feature films and other programming not available from conventional television. This service, however, is developmental in nature and gives rise to additional costs and problems so that it would be impossible to rely solely on this service to assure the feasibility of a cable system. At this time, the carriage of distant television signals providing programming of general interest remains essential for the viability of a cable system in an area such as Fresno. There may be some areas where over-the-air reception is so poor that a cable system could survive without distant signals because of the improved reception of local signals; however, this is not the case in Fresno where there are seven local stations which provide high quality signals.

The record before the Commission amply supports the fact that cable television would not be viable in Fresno without the carriage of distant signals. The fact is also evident since Fresno Cable first obtained a franchise to operate a cable television system in the City of Fresno in 1966. The system was, however, unable to commence operations until 1977 first because it was impossible to obtain authorization for the carriage of distant signals under

the Commission Rules in effect prior to 1972 and second because of Pappas' lengthy efforts to obtain a waiver of the post-1972 Rules allowing distant signal carriage.

The record in this case also establishes that cable television provides positive benefits to the public. The increased program diversity available to the public is only one benefit. Perhaps most significant is that cable television provides to the general public access to the media of mass communications. Pursuant to 47 C.F.R. § 76.254, all cable television systems serving 3,500 or more subscribers (which will include the system in Fresno) must have channel space available for use by members of the public, educational authorities, local governments, and persons desiring to lease space. Such parties may use the channel space to present programs of whatever type they desire, subject only to limited restrictions imposed by the Commission's Rules. Pursuant to 47 C.F.R. § 76.256, such cable systems must have available equipment for use in the production and presentation of public access programs. Access services of this nature are not available on the typical over-the-air television station. Moreover, it is San Joaquin's intention to provide access services substantially in excess of those required by the Commission's Rules. In addition, cable television has the potential for many other public services including two-way communications, digital services such as burglar alarms and locally originated cablecasting services of virtually all description.

Pappas, the party seeking to restrict signal carriage ordinarily permitted by the Rules, is the licensee of television station KMPH. Pappas alleges at page 4 of its petition that its station — KMPH — is a Fresno station. It should be clarified that KMPH is licensed to Tulare, California, only. Tulare is a community located approximately 40 miles from the City of Fresno. For the purposes of the Commission's cable television rules, Tulare is not considered part of the Fresno market. 47 C.F.R. § 76.51(a). A television market is

defined by the Commission's Rules as including an area extending 35 miles from a fixed reference point in a television station's city of license. 47 C.F.R. § 76.5(f), (g) and (i). Accordingly, since the City of Fresno is located more than 35 miles from Tulare, KMPH's city of license, the City of Fresno is not located in KMPH's television market as defined by the Commission's Rules.²

Pappas further states at page 4 of its petition that KMPH places a city grade contour over the entire City of Fresno. It should be noted that the record contains evidence that despite this *predicted* contour, many persons in Fresno do not receive a satisfactory signal from KMPH. This is significant since carriage of KMPH on cable television will serve to correct these reception problems.

The present cable television rules which Pappas seeks the Commission to waive were adopted in the *Cable Television Report and Order*, 36 FCC 2d 143 (1972). The Commission's action was preceded by an extensive four-year rulemaking proceeding in which various proposals were set forth and exhaustive comments were received. Pappas alleges at pages 6 to 7 and footnote 11 that the Commission lacked standards in adopting its Rules and that the Commission has "never disputed" this. The only evidence in the record to support the alleged lack of standards is a conclusory one sentence allegation by Pappas' economic consultant to this effect. This conclusory allegation was completely worthless in nature in that it set forth no factual basis for the conclusion. Nor is there any basis in the record for Pappas' assertion that the Commission "never disputed" its allegation. In point of fact, the underlying validity of the cable television rules was never raised in any

²When Pappas first acquired KMPH, it represented to the Commission that it was not the station's intention to serve Fresno. *Pappas Television, Inc.* 38 FCC 2d 154, 155 (1972).

meaningful way in the proceeding before the Commission and is not properly within the scope of this appeal.

Pappas' ultimate showing in its lengthy effort to convince the Commission to abandon its signal carriage rules is the Cooper Study.³ The Cooper Study is an attempt to predict the impact on KMPH of future cable carriage of two distant independents on future cable systems throughout the Fresno Area of Dominant Influence (which encompasses an area of five counties). It consists principally of economic projections covering a period extending to 1985. Since it is attempting to predict future impact rather than to assess the impact of existing cable service (which is as yet minimal in the Fresno area), it necessarily relies on numerous assumptions. The validity of these assumptions was the subject of extensive and heated debate in the proceeding before the Commission.

Pappas' characterization of the Commission decision concerning the Cooper Study (App. 70) at page 8 of its petition is disingenuous. The characterization of the Commission's decision by the Court below is more accurate:

"The Commission weighed the Cooper Study with care, making such adjustments as it believed to be warranted, and concluded that it did not make out a case of economic injury to petitioner suf-

³Pappas notes at page 8 and footnote 13 the material received from one Clay which was allegedly ignored by the Commission. Clay is described as a "media economist". In fact, the record reflects Clay is qualified in broadcast survey research. His contribution consisted of a small amount of background information on the Fresno market and opinions concerning the correct methods of making financial projections. In addition, he executed a 2 page statement endorsing the Cooper Study. This statement was conclusory in nature and contributed no additional facts. The significance of Clay's material was accordingly *de minimus* in nature.

ficient to justify waiver of the standards set in its rules." (App. 89).

It should be noted that the Commission's decision included as an attachment an analysis of the Cooper Study by an economist with its Cable Television Bureau. (App. 76 and 79). In violation of Rule 23(1)(i) of this Court, Pappas has failed to include a copy of this staff analysis in its Appendix. The staff analysis demonstrates that the Commission made an exhaustive analysis of the merits of the Cooper Study.

Pappas alleges at footnote 14 on page 8 that it had sought alternative relief in the form of syndicated program protection. This is in error. At no time in the proceeding before the Commission did Pappas request syndicated program protection.⁴ Indeed, such a request would have been inconsistent with Pappas' contention that only the complete prohibition of the two distant independents would save it from ruin.

The Court below affirmed the Commission without a formal opinion. It should be noted that the Memorandum set forth at App. 87 to 89 is an informal discussion of the Court's view of the case. The original of the order bore the notation "Not to be published — see local rule 8(f)." Rule 8(f) of the Court below indicates that unpublished memoranda may not be cited as precedent. Pursuant to its Rule 13(c), the Court below will dispense with a formal opinion "where the issues occasion no need therefore. . .".

⁴The only mention made by Pappas of this issue occurred in a request for oral argument filed by Pappas. As noted at App. 80, this request was filed in a grossly untimely manner. In its request, Pappas suggested syndicated exclusivity as a possible topic at the proposed oral argument. It neither endorsed nor urged the grant of such relief. The Commission denied Pappas' request for an oral argument with the result that the issue was never in fact raised. The cursory reference to the matter in an untimely and unauthorized pleading cannot be viewed as a request for alternative relief.

REASONS FOR DENYING THE WRIT

I

NO VALID QUESTION IS RAISED AS TO THE COMMISSION'S JURISDICTION OVER CABLE TELEVISION

Pappas alleges as its first point that the Commission has no jurisdiction to consider the public interest in cable television but must restrict its regulatory activities in this area to protecting broadcasters. This point must fail initially since Pappas has never previously raised it either before the Commission or the Court below. The Commission as early as August 9, 1974, placed Pappas on notice that the effect of the requested relief (the prohibition of otherwise lawful distant signals) on cable television service would be a pertinent factor in resolving its waiver requests (App. 16). See also App. 29-30, where the Commission clearly stated its concern in this regard. There is accordingly no justification for Pappas' failure to raise any jurisdictional arguments it wished to interpose at an earlier stage in this proceeding.

The argument in any event is without merit. Initially, the argument is a moot point unless it is first found that Pappas has successfully demonstrated that cable carriage will result in serious injury to it. Without such a demonstration, there would be no basis for waiving the rules irrespective of the impact of such a waiver on cable. The Commission found that Pappas failed to demonstrate serious injury. This conclusion was affirmed by the Court below. There is no justification for a further rehashing of the pros and cons of the Commission's factual determinations in this respect.

There can further be no doubt the Commission has jurisdiction over signal carriage matters. *United States v.*

Southwestern Cable Co., 392 U.S. 157 (1968). To the extent the Commission has jurisdiction in this area it must exercise such jurisdiction for the purpose of furthering the "public convenience, interest, or necessity," 47 U.S.C. § 303, and not for the purpose of protecting the profits of one industry. By its *Cable Television Report and Order*, 36 FCC 2d 143 (1972), the Commission found that the orderly growth of cable television is in the public interest. It also placed limits on the number of signals that may be carried to avoid any impairment of local broadcast service and further imposed on many systems (including the one in Fresno) obligations to provide public and other access services so that cable systems would affirmatively contribute to the public interest by making the cable television medium available to the general public. To the extent that cable television is consistent with the public interest, the Commission can properly take into account the impact on cable television of a requested waiver of the rules. This conclusion is reinforced by *United States v. Midwest Video Corp.*, 409 U.S. 649 (1972). Pappas' attempt at page 11 to distinguish *Midwest Video Corp.* on the grounds that there is an adequate number of television stations in Fresno is misplaced since none of these stations provide public access, a service uniquely available by cable television.

II

NO DUE PROCESS QUESTIONS
ARE RAISED

Pappas' second point is that it has been denied due process because the Commission has no standards governing the grant of waivers.⁵ Its arguments in this regard assume as fact several matters that are very much in dispute, i.e., (1) that the Commission has no standards governing the showing required in a waiver request and (2) that Pappas has made a compelling showing of likely injury. Both the Commission and the Court below have rejected Pappas' position on these points. Further review would again essentially involve nothing more than a rehashing of these primarily factual issues.

With respect to the alleged lack of standards, a review of prior Commission and judicial precedent will reveal that there are ample guidelines as to the type of information to be contained in a waiver request including: (1) statistics as to how many viewers would be lost to distant stations; (2) how many rating points would be lost; (3) how many advertisers would be lost; (4) how many advertising dollars would be lost; (5) economic projections; (6) specifics regarding the station's present financial status; (7) the impact of any past CATV activity; (8) information as to the cumulative impact of prospective CATV operations; (9) information concerning such factors as probable audience, revenue, income and program service; (10) information as to the market involved and the impact of future growth in market revenues; (11) impact of program exclusivity protec-

⁵Pappas also alleges its rights were violated because the Commission relied on the analysis of its staff, which Pappas characterizes as *ex parte*. As noted by the Court below, this question is not properly within the scope of this appeal since it was never raised before the Commission. (App. 89). In any event, the suggestion that an administrative agency may not consider the written views of its staff is without merit, as noted by the Court below.

tion; and (12) impact of the requested relief on cable television operations.⁶

Pappas further contends that the Commission has acted arbitrarily by granting waivers in other cases on the basis of lesser showings. It should first be emphasized that none of the cases cited by Pappas involve requests to prohibit a cable system from carrying distant independent stations. As noted, the grant of such relief would have a drastic impact on the cable television system. The cases cited by Pappas relate to foreign language stations, educational stations and program exclusivity. In each case, the adverse impact on the cable operator from the grant of the waivers is minimal since the type of programming involved is not critical to the cable system's well-being. Furthermore, each of the cases is otherwise distinguishable from this case, as noted by the Court below with respect to the waiver granted to KAIL. (App. 88).⁷

Pappas fails to recognize that each request for a waiver of the rules involves a balancing between the public interest to be served by adhering to the Rule and the public interest to be served by waiving it. Clearly, the appropriate balance will vary depending on the individual facts. Where, for instance, a requested waiver would have only a minimal impact on the public interest the Rule is intended to further,

⁶See, e.g., *Central New York Cable TV, Inc.*, 11 FCC 2d 150 (1967); *Vumore Video Corp. of Colorado*, 12 FCC 2d 955 (1968) *aff'd sub nom. Pikes Peak Broadcasting Co. v. FCC*, 137 U.S. App. D.C. 234, 422 F.2d 671 *cert denied* 395 U.S. 979 (1969); *Spectrum Cable Systems, Inc.*, 40 FCC 2d 1019 (1973), *recon. denied*, 44 FCC 2d 867 (1974), *aff'd sub nom. Springfield Television Broadcasting Corp. v. FCC* 512 F.2d 992 (D.C. Cir. 1975); and the decisions under review in the instant proceeding, especially App. 29 and 30 where, it will be noted, *Pappas* itself cited the type of information expected by the Commission.

⁷With respect to KAIL, that station also objected to the carriage of two distant independents, as did Pappas (App. 3). The Commission denied this relief to KAIL, as it did to Pappas. (App. 10). Both stations received identical treatment on that issue.

the Commission could quite properly grant a waiver on a lesser showing than if the requested waiver would have a devastating impact on the public interest represented by the Rule. This is precisely the case with respect to the cases cited by Pappas.

This is illustrated by *Colby-Bates-Bowdoin Educational Telecasting Corporation v. FCC*, 534 F.2d 11 (1st Cir. 1976), relied on by Pappas to show a conflict among the Circuits. That case involved a provision of the Rules governing the carriage of out-of-state educational stations (47 C.F.R. § 76.61(d))⁸ which provision is not involved in this case. The concern of the First Circuit was that the language of this specific provision and earlier Commission precedent suggested that local educational stations would face a lesser burden in seeking to exclude an out-of-state competitor than would ordinarily be the case. In fact, a heavy burden had been placed on the educator in *Colby*. For this reason, the First Circuit returned the case to the Commission with the suggestion that if that was how the Commission wished to proceed, it should amend its Rules to be consistent with its policy.

No similar situation applies here. The Rules permitting carriage of two distant independents contain no qualification on that right. 47 C.F.R. § 76.63(a) as it relates to 47 C.F.R. § 76.61(b). The *Cable Television Report and Order*, *supra*, at paragraphs 112 and 113, makes clear the heavy burden facing parties asking for a waiver of these Rules, which policy has been consistently enforced. See the cases cited in footnote 6, *supra*. Also, the balance of the equities is, again, completely different. Unlimited carriage of educational stations is permitted since such stations

⁸The Rule permits carriage of distant out-of-state educational stations "... in the absence of objection filed pursuant to § 76.7 by any local noncommercial educational station or state or local educational authority."

generally direct their programming to small, specialized audiences. Accordingly, carriage of distant educational stations is unlikely to affect the viability of commercial broadcasting. By the same token, the impact of losing the right to carry such a station would generally have a much less severe impact on a cable system than would result if the Fresno system lost the right to carry the only two distant English language commercial television stations permitted by the Commission's Rules. This is the extraordinary relief sought by Pappas.

Thus, no conflict exists between the action of the Court below and the First Circuit's decision in *Colby*. Nor does the *Colby* case support the proposition that the Commission has acted arbitrarily with regard to its rules allowing the carriage of distant independent stations.

It should finally be emphasized that the Commission did not rely upon any failure to meet Commission standards in denying Pappas special relief. The Commission thoroughly considered the facts alleged in the Cooper Study and concluded that those facts did not show that the carriage of two distant independents would undermine Pappas' ability to serve the public interest. (App. 83). Put otherwise, under the guise of urging that its due process rights have been violated, Pappas is asking this Court to substitute its judgment for that of the Commission as to the merits of the Cooper Study.

The Commission fulfilled its obligation to give Pappas' request a "hard look". *WAIT Radio v. FCC*, 125 U.S. App. D.C. 317, 418 F.2d 1153 (1969). The Court below fulfilled its limited review functions in these types of cases. *WAIT Radio v. FCC*, 149 U.S. App. D.C. 169, 459 F.2d 1203, *cert. denied*, 409 U.S. 1072 (1972). No denial of due process is involved.

III

THERE IS NO CONFLICT WITH OTHER
DECISIONS OF THIS COURT

The third point raised by Pappas is that the Commission's decision is in conflict with decisions of this Court because it will allegedly prohibit Pappas from providing news and public affairs programming. This point is premised on a mischaracterization of the Commission's decision. Pappas alleges that the Commission concluded that the impact on cable television was of greater concern than Pappas' inability to provide news and public affairs. In fact, however, the Commission concluded, after an exhaustive analysis of the Cooper Study, that Pappas had failed to document that the relief sought was necessary to prevent a loss of service to the public. (App. 83).

Thus, once again, review granted pursuant to this point would involve principally a rehashing of the merits of the Commission's factual determinations. The legal contention Pappas seeks to raise is irrelevant since it distorts the basis of the Commission's decision denying Pappas' Petition for Special Relief.

Pappas alleges a conflict with the decisions of this Court. In support, it cites two decisions of this Court. *Federal Communications Commission v. Sanders Bros.*, 309 U.S. 40 (1940) and *National Broadcasting Co. v. United States*, 319 U.S. 203 (1943). There is no conflict between those decisions and the decisions of the Commission and the Court below. It is also difficult to perceive the relevance of those decisions to this case.

It should also be emphasized that the record in this case does not demonstrate that Pappas presently provides any significant news and public affairs programming. It would be clearly improper for the Commission to grant drastic special relief based on programming that doesn't exist and may never exist irrespective of the Commission's decision. Nor can the Commission be expected to encourage the

tactics of a broadcaster who views its public service obligations as a hostage to be exchanged for waivers of the cable television rules.

On the other hand, the system in Fresno will provide substantial public interest services in the form of public access. Public access is available only via cable and would be lost if cable service is lost because of a waiver of the signal carriage rules.

Pappas alleges at page 17 an inconsistency between the Commission's action here and another case, *KID Brocasting Corp.*, 61 FCC 2d 1155 (1976). The relief granted in that case consisted only of a *temporary* waiver of the network nonduplication rules. 47 C.F.R. § 76.92 *et seq.* Thus, the relief granted was in no way comparable to the relief sought by Pappas. Moreover, the relief was premised on an assessment of the immediate impact of existing cable service not, as here, on a prediction as to the impact of future cable service over a ten-year period. Also, the waiver was granted in view of a unique circumstance that the Commission had determined *after a rulemaking proceeding* should call for a less stringent burden on those seeking a waiver. *Second Report and Order in Docket No. 19995*, 54 FCC 2d 229 (1975) at paragraphs 25 to 27. Accordingly, once again, the facts of *KID* are wholly distinguishable from the facts here.

IV

THE PETITION SHOULD BE DENIED BECAUSE
OF NON-COMPLIANCE WITH RULE 23
OF THIS COURT

Rule 23(1)(i) requires a petitioner for certiorari to submit in an appendix "... all opinions of courts or administrative agencies in the case ...". As discussed above, Pappas has omitted from its Appendix an attachment to the Commission decision set forth at App. 70 consisting of a Com-

mission staff analysis of the Cooper Study. The staff analysis is critical to this Court's assessment of the Commission's decision since it demonstrates the exhaustive consideration that was given to the merits of the Cooper Study. Under this circumstance, a serious question is raised as to why Pappas elected to omit this critical portion of the Commission's decision from its Appendix.

Rule 23(4) states that the failure of a petitioner to present its case "with accuracy, brevity and clearness" will be grounds for denial. In addition to its omission of the staff analysis, Pappas' petition is at best disingenuous in several other respects, including (1) the assertion that KMPH is a Fresno station without also explaining that it is not so considered under the cable television rules (a fact well known to Pappas); (2) the unqualified assertion at footnote 14 that Pappas had sought syndicated program protection when Pappas well knows that assertion is contested; (3) the repeated proffering as fact of matters that are very much in dispute, such as the existence of Commission standards and the likelihood of injury to Pappas from the carriage of distant signals; and (4) repeated mischaracterizations of the Commission's decisions below, especially as discussed in the foregoing section and in the Counterstatement of the case.

The practice of Pappas of alleging as facts matters which are in dispute is particularly objectionable in Pappas' statement of the case. It is impossible for this Court to properly assess the merits of a petition if the statement of the case does not objectively apprise the Court of the pertinent facts.

Pappas alleges, for instance, at page 5 of its petition that it was hampered in preparing its waiver petition due to the absence of Commission standards. Again at page 8 of its petition, Pappas alleges as fact the absence of Commission standards and that the importation of distant signals would

prevent Pappas from providing news and public affairs programming. These matters are, of course, the ultimate issues in this proceeding. They represent merely the opinion of Pappas which has been disputed by the other parties, the Commission and the Court below.

For these reasons, the Pappas petition should be rejected for noncompliance with Rule 23.

CONCLUSION

Pappas has failed to meet any of the criteria for the grant of certiorari as set forth in Rule 19(1)(b) of this Court. The only questions properly reviewable in this proceeding are factual ones of little general importance. The Court in the past has denied certiorari in analogous cases involving waivers of the Commission's signal carriage rules. *Pikes Peak Broadcasting Co. v. FCC*, 137 U.S. App. D.C. 234, 422 F.2d 671 cert. denied 395 U.S. 979 (1969).

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